Supreme Court, U.S.
FILED

981078 JAN 4 - 1999

No.

IN THE
Supreme Court of the United States
October Term, 1998

Margie J. Phelps.
Petitioner

vs.

Michael Barbara
Carla J. Stovall and
John Bork

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

APPENDIX TO: PETITION FOR WRIT OF CERTIORARI

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6288

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NOT DESIGNATED FOR PUBLICATION

No. 74,090

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ST. DAVID'S EPISCOPAL CHURCH

v.

WESTBORO BAPTIST CHURCH, INC.

In the Matter of the Citation in Contempt of:

FRED W. PHELPS, SR., and
MARGIE J. PHELPS,
Appellants.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MICHAEL A. BARBARA, retired judge, assigned. Opinion filed January 17, 1997. Affirmed in part and reversed in part.

Jonathan B. Phelps, of Phelps, Chartered, of Topeka, for appellant Fred W. Phelps, Sr.

Chris R. Davis, and *Fred Phelps, Jr.*, of Phelps,

Chartered, of Topeka, for appellant Margie J. Phelps.

John K. Bork, assistant attorney general, and *Carla J. Stovall,* attorney general, for appellee.

Before KNUDSON, P.J., MARQUARDT,J., and TIMOTHY E. BRAZIL, District Judge, assigned.

Per Curiam: Margie J. Phelps and Fred W. Phelps, Sr., appeal their respective contempt convictions and the punishments imposed by the trial court. We affirm Margie Phelps' conviction and reverse Fred Phelps' conviction.

In a recent decision of this court, *St. David's Episcopal Church v. Westboro Baptist Church, Inc.,* No. 73,928, unpublished opinion filed June 21, 1996, the underlying factual circumstances in the injunction action were detailed. We will only narrate the additional circumstances pertaining to the contempt proceeding.

St. David's Episcopal Church (St. David's) initiated

this litigation against the Westboro Baptist Church, Inc., (WBC) by seeking an injunction to prevent WBC from picketing St. David's. Fred Phelps is the pastor of WBC; his daughter Margie Phelps was legal counsel for WBC. Judge Michael Barbara, a retired district court judge and a law professor at Washburn Law School was assigned to hear the case.

On July 21, 1994, Judge Barbara entered a temporary restraining order (TRO) imposing limitations on WBC picketing at St. David's. On August 9, 1994, WBC's motion to set aside the TRO was considered by the trial court and denied.

On August 14, 1994, Fred Phelps broadcast what is referred to in the record as a sermon on a Topeka radio program known as the "Old School Baptist Hour." Fred Phelps narrated information that he claimed a third party had recently divulged to him about Judge Barbara. Based upon

the third-party information, Fred Phelps stated that Judge Barbara had acted immorally and unlawfully in his private life and in a manner that reflected upon his fitness to be a law professor.

On September 14, 1994, Margie Phelps filed a motion for a change of judge pursuant to K.S.A. 20-311d. Pursuant to this motion, Judge Barbara held a hearing on September 20, 1994, with counsel for St. David's and WBC. At this hearing, Margie Phelps presented Judge Barbara with a transcript of the sermon and had it marked as an exhibit for identification purposes. After reviewing the exhibit, Judge Barbara stated:

> "As to what's an attempt to be No. 7, I will tell counsel, this is contemptuous language against the Court. This has nothing to do -- assuming the truth of this matter, it has nothing to do with my ability to sit as a fair and impartial judge. And I warn counsel that if she persists in this No. 7, she may be facing some contempt proceedings herself since you are the one that is offering it, as well as if Revered Phelps is offering it. But, this has nothing to do whatsoever with my ability to sit as a judge in this case."

Judge Barbara went on to explain that the contents of the exhibit dealt with his personal life, attacked him personally, and constituted an effort to intimidate the court. After Margie Phelps withdrew the exhibit, she stated that her only reason for withdrawing the exhibit was that the court threatened her with contempt.

On September 15, 1994, Washburn and the Kansas Attorney General's Office received a fax under the Westboro Baptist Church letterhead that made derisive and disparaging comments through the printed word and graphic art about Judge Barbara.

On September 29, 1994, Judge Barbara filed affidavits and issued orders for both Fred Phelps and Margie Phelps to appear and show cause why they should not be held in contempt of court.

The affidavit regarding Fred Phelps alleged contumacious conduct by: (1) the publication and

dissemination of the fax, (2) submission of exhibit 7 at the hearing on September 20, 1994, and (3) the content of the radio broadcast on August 14, 1994.

The affidavit regarding Margie Phelps alleged contumacious conduct arising out of her conduct at the hearing on September 20, 1994, including the preparation and offering of exhibit 7.

The contempt proceedings extended over four days. Judge Barbara found Fred Phelps guilty of indirect criminal contempt and fined him $1,000 plus one-half the costs of the proceedings. The court also found Margie Phelps in direct criminal contempt, ordered her to be removed as counsel in the underlying litigation, and imposed a fine of $500 plus one-half the costs of the proceedings. In addition, the court prohibited her from practicing law in the Third Judicial District until the fine was paid in full.

On appeal, Fred Phelps and Margie Phelps have

raised 23 different issues. Because of the conclusions we reach, the discussion that follows will generally be limited only to the issues dispositive of the appeal.

Recusal of Judge

Fred Phelps and Margie Phelps contend that Judge Barbara should have recused himself from the contempt hearing because of his stated belief that their actions were a personal attack upon his character and integrity and were designed to drive him from the underlying litigation between St. David's and WBC.

On appeal, the issue is whether it was inappropriate for Judge Barbara to preside over the contempt proceedings and, if so, whether there has been a showing of actual bias or prejudice that would require setting aside the judgments.

> In deciding this issue we must consider "whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, *not* in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in

> the mind of a reasonable person with knowledge of all the circumstances." *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 788 (1984).

We are also mindful that a party or his attorney should not be permitted to force recusal upon a trial judge as a result of unwarranted personal attacks, which are designed for no other purpose than to drive a judge from the case. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971).

The Code of Judicial Conduct provides that a judge should recuse if his or her impartiality might reasonably be questioned; *e.g.*, "[if the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Rule 601, Canon 3C(1)(a)(1996 Kan.Ct.R.Annot. 394); see Rule 601A, Canon 3E(1)(a).

The United States Supreme Court and the Kansas Supreme Court have considered the issue of recusal in

contempt proceedings. In *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed2d 921, 84 S.Ct. 841, *reh. denied* 377 U.S. (1964), an attorney, who had been called to the stand as a witness for the prosecution, refused to answer questions and accused the trial court of treating him unfairly and improperly in ruling on the evidence. At the end of the underlying criminal proceedings, the court held a contempt hearing and found the attorney guilty of contempt.

On appeal, the attorney argued that he was denied a fair hearing because his contemptuous remarks were a personal attack on the judge, which necessarily biased the judge and required his recusal. The Supreme Court disagreed and stated: "We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." 376 U.S. at 584. The Court further stated that the record did not

leave it "with an abiding impression that the trial judge permitted himself to become personally embroiled" with the attorney. 376 U.S. at 585. The Court noted that the judge had not proceeded summarily but had given the parties notice and an opportunity for a hearing which was "conducted dispassionately and with a decorum befitting a judicial proceeding." 376 U.S. at 588. The court held that the trial court had not erred by failing to recuse itself and stated that it could not "say there was bias, or such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused." 376 U.S. at 588.

In *Mayberry*, the defendant in the underlying criminal action acted as his own attorney. During the trial, the defendant made numerous insulting and vulgar remarks to the trial judge. After the guilty verdicts had been returned

by the jury, and prior to sentencing, the judge found the defendant guilty of 11 counts of criminal contempt. The Supreme Court found that where a trial court does not act summarily, "it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." 400 U.S. at 464. The Court noted that "[a]t times a judge [may] not [have] been the image of 'the impersonal authority of law'...but [may] become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge." 400 U.S. at 465.

In *State v Pondexter*, 225 Kan. 425, 590 P.2d 1074 (1979), Pondexter, a codefendant in a criminal case, who was sitting in the spectator section of the courtroom, became visibly upset and was removed. Outside the courtroom, he made threats against the judge and others; the judge was informed of the threats. Eventually returning to the

courtroom, Pondexter refused to leave when directed to do so by a security officer. After a scuffle, Pondexter was arrested. Later in the day, a contempt hearing was conducted, and Pondexter was found guilty of criminal contempt.

On appeal, Pondexter argued that the trial court should have recused itself from the contempt proceedings. Citing *Mayberry* and *Ungar*, the court held that the trial court did not err in failing to recuse itself. The court stated that when the conduct of the "contemner [is] not such as to constitute an insult to the judge personally or attack his judicial integrity, it may be proper for that judge to give notice, afford full opportunity for a hearing, and conduct a judicial hearing dispassionately and with fitting decorum. When this has been accomplished, the contemner's due process rights have been adequately protected regardless of which judge presided at the contempt hearing." 225 Kan. at

433-34.

All three of the above case are helpful; however, *Mayberry* is most instructive and contains reasoning that we believe is applicable to the case at hand. There is no doubt that Judge Barbara found the actions of Fred Phelps and Margie Phelps to be an assault upon his character and integrity. Referring to the transcript of Fred Phelps' sermon, which Margie Phelps had marked for identification purposes as exhibit 2 (State's exhibit 7 at trial), Judge Barbara, among his detailed findings and conclusions, stated:

> "1. Exhibit Number 2 contains baseless and scurrilous and offensive *personal charges* against the Court and *the judge in particular.*
>
> "2. Said exhibit *impugns the integrity of the Judge*, amounting to disrespect for the judicial dignity of the court and the judicial system in general.
>
> "3. The only purpose for offering state's Exhibit Number 2 was to intimidate and embarrass or coerce the Court, intending to force the Court to recuse itself.
>
> "4. Where an exhibit presented to the Court contains

> *scandalous, scurrilous and defamatory matters,* such filing constitutes contempt, and any allegations whether true or false are so immaterial and irrelevant as to have no proper place in any pleading, and the filing thereof constitutes an abuse of process and is contemptuous....
>
> ....
>
> "6. An intent to coerce a judge in the decision making process by a *personal attack* on the Court constitutes contempt." (Emphasis added.)

We have read State's exhibit 7. Without question, the exhibit constitutes a direct assault upon Judge Barbara's integrity and character as an individual and questions whether he is the sort of person who should be a Washburn Law School professor. Thus, this case is distinguishable from *Ungar*, the Supreme Court held that assuming there might be situations where "criticisms of judicial conduct...are so personal and so probably productive of bias that the judge must disqualify himself to avoid being the judge in his own case," Ungar's remarks to the judge were not that egregious. 376 U.S. at 583.

We readily acknowledge that Judge Barbara exhibited appropriate judicial demeanor and temperament during the exchange with Margie Phelps at the recusal hearing on September 20, 1994, and thereafter in the contempt trial of Fred Phelps and Margie Phelps. But that is not the issue. As was noted both in *Mayberry* and *Pondexter*, if the conduct of the contemner constitutes a highly personal attack on the trial judge, it is problematical for that judge as accuser to also preside as a judicial officer in the subsequent criminal contempt trial without giving an appearance of impropriety. We conclude that Judge Barbara should have recused.

We next consider whether prejudice to the substantial rights of either Fred Phelps or Margie Phelps has been shown. Margie Phelps' questionable conduct and actions were in court and are of record. Likewise, the statements and actions of Judge Barbara are also of record. We

conclude from the record that Margie Phelps' actions did constitute direct criminal contempt of court. Her attempt to introduce State's exhibit 7 at the hearing to disqualify the trial judge was inexcusable. The exhibit had nothing whatsoever to do with possible judicial bias or prejudice. judge Barbara was absolutely correct--the exhibit was intended to embarrass and humiliate the court and drive the judge from the case. No judge would countenance such conduct. Our review of the proceedings persuades us that Margie Phelps was afforded a full and fair hearing by Judge Barbara. Her conviction was overwhelmingly supported by the evidence, and the punishment imposed was very reasonable and well within the exercise of reasonable judicial discretion. Margie Phelps has failed to demonstrate prejudicial error.

The contempt proceeding against Fred Phelps is factually and legally distinguishable from Margie Phelps'.

His guilt or innocence depended upon issues of fact that had to be resolved by Judge Barbara as trier of fact. Unlike our review of Margie Phelps' conviction, we are not able to make a similar objective assessment regarding Fred Phelps's conduct and actions. Thus, we hesitate to conclude, as a matter of law, that failure of the trial judge to recuse was harmless error.

Jurisdiction

Phelps contends that the trial court lacked jurisdiction because (1) he was not a party to the action and (2) there was no court order that he was accused of violating.

We are not aware of any legal requirement that a person found in criminal contempt must be a party to the underlying action. There is no question that a person who is not a party may be found in direct contempt. See *State v. Pondexter*, 225 Kan. 425, 590 P.2d 1074 (1979). The question thus becomes whether a person who is not a party

may be held in indirect contempt of court.

In *Electronic Realty Associates, Inc. v. Gomez*, 18 Kan.App.2d 122, 125-26, 848 P.2d 458 (1993), this court stated that "[c]riminal contempt is intended to punish conduct that is 'in disrespect of a court or its processes, *or which obstructs the administration of justice.*" [Citation omitted.] A criminal contempt is 'conduct directed against the dignity and authority of a court'...." Certainly a person who is not a party has the potential to cause the court disrespect or to obstruct the administration of justice. See *Craig v. Harney*, 331 U.S. 367, 376, 91 L.Ed. 1546, 67 S.Ct. 1249 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946); and *Bridges v. California*, 314 U.S. 252, 62 L.Ed. 192, 86 S.Ct. 190 (1941). We conclude it is within the inherent power of a constitutional court to subject any individual, whether a party or not, to contempt proceedings for obstructing the

administration of justice.

A very similar argument can be made regarding the lack of an underlying order upon which the contempt proceedings are predicated. Pointing to K.S.A. 20-1201, Fred Phelps contends that a court's contempt powers are statutorily limited. K.S.A. 20-1201 states: "[C]ontempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed." Referring to K.S.A. 20-1204a, Fred Phelps amplifies this argument. K.S.A. 20-1204a addresses the procedures to be followed for indirect contempt and states, in material part:

> "(a) When an order in a civil action has been entered, the court that rendered the same may order a person alleged to be guilty of indirect contempt of such order to appear and show cause why such person should not be held in contempt if there is filed a motion requesting an order to appear and show cause which is accompanied by an affidavit specifically setting forth the facts constituting the alleged violation.
>
> ....

> "(d) The provisions of this section shall apply to both criminal and civil contempts, but in the case of a criminal contempt the court on its own motion may cause the motion and affidavit provided for in subsection (a) to be filed."

Fred Phelps' construction of the above statutes ignores the circumstance of contemptuous conduct designed to obstruct the administration of justice which does not take place directly in front of a judge, occur in criminal actions, or violate an existing order. Such a construction is not reasonable. "[T]he legislature is presumed to intend that a statute be given a reasonable construction, so as to avoid unreasonable or absurd results." *Todd v. Kelly*, 251 Kan. 512, 520, 837 P.2d 381 (1992).

We hold that the procedural requirements of K.S.A. 20-1204a are mandatory, but that the legislature did not intend that the statute limit the inherent power of a constitutional court to punish for contempt, regardless of whether there existed an underlying court order.

Finally, we note that it appears somewhat disingenuous for Fred Phelps to assert that he is not a party in the underlying litigation. He is the pastor of WBC and its spiritual leader. Under such circumstances, he acts as an agent for the church and is subject to the contempt powers of the court as a party with pending litigation before the court.

Fred Phelps further contends that the trial court failed to comply with the requirements of K.S.A. 20-1204a(a) and consequently lacked jurisdiction to proceed against him. We agree.

K.S.A. 20-1204a(a) provides for indirect contempt proceedings only "if there is filed a motion requesting an order to appear and show cause which is accompanied by an affidavit specifically setting forth the facts constituting the alleged violation." In this proceeding, only an affidavit was signed by Judge Barbara; no motion was filed.

"Contempt proceedings founded in statute must

follow the prescribed procedures and are to be strictly construed against the movant. Only the accused may waive these statutory requirements." *In re Seelke*, 235 Kan. 468, Syl ¶ 1, 680 P.2d 288 (1984).

Noncompliance with K.S.A. 20-1204a(a) is jurisdictional unless waived by the accused. Fred Phelps did not waive the requirement that a motion be filed. The trial court lacked jurisdiction.

Statutory Immunity

Citing K.S.A. 20-311e, Fred Phelps and Margie Phelps contend that they are not subject to contempt for their actions.

K.S.A. 20-311e provides: "No judge or court shall punish for contempt anyone making, filing or presenting the affidavit provided for by K.S.A. 20-311d." In addition, Fred Phelps argues that he is protected by this statute because the affidavit and order to show cause alleges that all

of his conduct was designed to obtain the recusal of the trial judge.

Interpretation of a statute is a question of law, and this court's scope of review is unlimited. *Foulk v. Colonial Terrace*, 20 KanApp.2d 277, Syl. ¶ 1, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Fred Phelps and Margie Phelps' contention is without merit. The record demonstrates that the trial court did not file contempt proceedings because they filed a motion for a change of judge. The court stated that the reason for the contempt citations was that Fred Phelps and Margie Phelps had attempted to intimidate, embarrass, or coerce the court into recusing itself.

K.S.A. 20-311e is intended to protect parties from arbitrary action by a judge after a party has filed a motion requesting recusal. The statute does not prohibit a judge from bringing a contempt action against a party based upon

wholly inappropriate conduct or scurrilous accusations that have no bearing upon the pending litigation.

The Fine Imposed

Margie Phelps claims that the trial court imposed excessive fines. Our standard of review is to ascertain whether the trial court abused its discretion. See *State v. Hunt*, 257 Kan. 388, 402, 894 P.2d 178 (1995).

Margie Phelps was filed $500 and ordered to pay one-half of the court costs for the contempt proceeding. We conclude from a review of the record that the fine was commensurate with the contumacious conduct of Margie Phelps and well within the judicial discretion afforded the trial court.

Other Issues Raised

We have considered all of the other issues raised by Margie Phelps and conclude that none of them constitute reversible error.

For the above reasons, we affirm the conviction of Margie Phelps and the punishment imposed; we reverse the conviction of Fred Phelps.

B. Order of the Kansas Court of Appeals denying Motion for Rehearing dated February 12, 1997

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94CV697

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

CHRIS R. DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

ST. DAVID'S EPISCOPAL CHURCH
V NO. 95-74090-A
WESTBORO BAPTIST CHURCH, INC.

IN THE MATTER OF THE CITATION IN
CONTEMPT OF:
FRED W. PHELPS AND
MARGIE J. PHELPS, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

APPELLANT'S MOTION FOR REHEARING OR MODIFICATION WITH SUGGESTIONS FOR REHEARING EN BANC.
DENIED.

DATE: 02/12/97.

CAROL G. GREEN
CLERK

C. Order of the Kansas Supreme Court denying Petition for Review dated March 19, 1997

SUPREME COURT ORDER

DISTRICT CASE NO. 94CV697

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JONATHAN B PHELPS
PHELPS CHARTERED
P O BOX 1886
TOPEKA KS 66601-1886

ST. DAVID'S EPISCOPAL CHURCH
V NO. 95-74090-AS
WESTBORO BAPTIST CHURCH, INC.

IN THE MATTER OF THE CITATION IN
CONTEMPT OF:
FRED W. PHELPS AND
MARGIE J. PHELPS, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW OF MARGIE J. PHELPS.
DENIED.
ADDITIONAL AUTHORITIES NOTED.

DATE: 03/19/97.

CAROL G. GREEN
CLERK

D. Order of the federal district court dismissing habeas petition dated November 18, 1997

FILED
U.S. District Court
District of Kansas
97 Nov 18 PM 2:50
Ralph L. DeLoach
Clerk
BY /s/ C. Barnthson, Deputy
AT KANSAS CITY, KS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARGIE J. PHELPS,	)
	)
Petitioner,	)
vs.	) CIVIL ACTION
	) No. 97-3110-GTV
HONORABLE MICHAEL BARBARA, CARLA J. STOVALL, and JOHN BORK,	)
	)
Respondents.	)

MEMORANDUM AND ORDER

This case is before the court on petitioner's habeas corpus petition (Doc. 1) filed pursuant to 28 U.S.C. § 2254. Petitioner seeks the dismissal or reversal of a finding of criminal contempt. In the alternative, petitioner seeks the same relief under 42 U.S.C. §§ 1983 and 1988. For the reasons set

forth below, the petition is dismissed.

I. Background

On June 13, 1994, St. David's Episcopal Church, located in Topeka, Kansas, filed a civil action to limit members of the Westboro Baptist church from harassing or assaulting members or visitors of St. David's as they entered the church. Petitioner served as Westboro Baptist Church's attorney in this matter. Judge Michael Barbara, a retired district court judge and a law professor, was assigned to hear the case. On July 21, 1994, Judge Barbara entered a temporary restraining order imposing limitations on picketing at St. David's by Westboro Baptist Church members.

On August 14, 1994, Fred W. Phelps, Sr., petitioner's father made a statement on a Topeka radio program known as the "Old School Baptist Hour." During this broadcast, Mr. Phelps stated that Judge Barbara had acted immorally and unlawfully in his private life and in a manner that reflected on

his fitness to be a law professor.

On September 14, 1994, petitioner filed a motion for a change of judge pursuant to K.S.A. 20-311d. Judge Barbara held a hearing on this motion on September 20, 1994. During the hearing, petitioner presented Judge Barbara with a transcript of Mr. Phelps' sermon and had it marked as an exhibit for identification purposes. After reviewing the exhibit, Judge Barbara stated that the exhibit contained contemptuous language and that it was irrelevant to his ability to sit as a fair and impartial judge. Further, he told petitioner that if she persisted in offering the exhibit, she might face contempt proceedings. Petitioner withdrew the exhibit.

As a result of petitioner's actions, Judge Barbara issued an order directing petitioner to show cause why she should not be held in contempt. Following a hearing in the contempt proceedings, Judge Barbara found petitioner in direct criminal contempt and ordered her to be removed as counsel in the

underlying litigation and imposed a fine of $500 plus one-half the costs of the proceedings. In addition, the court prohibited her from practicing law in the Third Judicial District until the fine was paid.

On January 17, 1997, the Kansas Court of Appeals upheld petitioner's conviction of direct criminal contempt. Petitioner's motion for rehearing or modification with suggestion for rehearing en banc was denied by the Kansas Court of Appeals on February 12, 1997. On March 19, 1997, the Supreme Court of the State of Kansas denied petitioner's motion for review. Petitioner filed her petition for a writ of habeas corpus in this court on March 31, 1997.

II. Discussion

Prior to deciding the merits of a habeas petition, the court must first determine whether an evidentiary hearing is required. See Rule 8(a) Governing § 2254 Cases in the United States District Courts. The court finds that the papers filed by

the parties and the state court record are sufficient to resolve the case. Accordingly, the court finds that no evidentiary hearing is required to decide petitioner's claims.

The federal habeas corpus statute, 28 U.S.C. § 2254, gives federal courts jurisdiction to entertain habeas corpus petitions filed by individuals who are "in custody" or subject to future custody pursuant to a state court judgment. See Rule 2 Governing § 2254 Cases in the United States District Courts. Historically, habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. See McNally v. Hill, 293 U.S. 131 (1934). However, "in custody" now includes a person on parole, Jones v. Cunningham, 371 U.S. 236 (1963), at large on his own recognizance but under several conditions pending execution of his sentence, Hensley v. Municipal Court, 411 U.S. 345 (1973), and even persons unconditionally released from prison subsequent to filing of

their petition. Carafas v. LaValle, 391 U.S. 234 (1968). Despite this more liberal application of habeas corpus, the Supreme Court has recognized that "[t]he custody requirement of habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restrains on individual liberty" Hensley, 411 U.S. at 351.

A. "In Custody" Requirement

Plaintiff argues that she satisfies the "in custody" requirement of § 2254 for the following reasons: (1) she is subject to the terms and conditions of an appearance bond; (2) she is barred from practicing law in the Third Judicial District until she pays the $500 fine; and (3) she is unconditionally barred from appearing as WBC's counsel in the St. David's case. Petitioner's arguments do not entitle her to the relief sought in this case.

First, it does not appear from the record before the court that petitioner is under the obligation of an appearance

bond. Attached to Petitioner's Traverse is Exhibit 1 labeled, "Copy of Bond Required by Respondent Barbara." However, the court concludes that petitioner's exhibit is not a bond. It contains no promise to appear. Rather, it is a Qualification of Surety reflecting petitioner's assets, debts, and obligations. Although this document notes that petitioner is a surety on a bond for Fred W. Phelps for $5,000.00, neither the Qualification of Surety nor the pre-existing surety agreement creates any conditions or obligations on petitioner relevant to this habeas petition.

Second, the $500 fine and any collateral consequence resulting from nonpayment of the fine do not amount to "custody" for purposes of a habeas petition. Following Hensley, the Fifth, Seventh, and Ninth Circuits have held that a fine-only conviction is not considered a sufficient restraint on individual liberty to meet the "in custody" requirement of the habeas corpus statute. See Dremann v. Francis, 828 F.2d 6,7

(9th Cir. 1987); Hanson v. Circuit Court, 591 F.2d 404, 407 (7th Cir. 1979); Edmunds v. Won Bae Chang, 509 F.2d 39, 41 (5th Cir. 1975). Furthermore, "the ordinary collateral consequences or civil disabilities flowing from a fine-only conviction, although they may be restraints on liberty, are not severe enough to put the convicted person in custody within the meaning of the habeas corpus statute." Hanson, 591 F.2d at 407. In Dremann and Hanson, the petitioner faced incarceration upon nonpayment; however, those courts found that potential incarceration was insufficient to meet the "in custody" requirement. Dremann, 828 F.2d at 7; Hanson, 591 F.2d at 407. It is this court's conclusion that the prohibition from practicing law in the Third Judicial District until the fine is paid, does not satisfy the custody requirement of § 2254.

Finally, petitioner claims that she is "in custody" because she is unconditionally barred from acting as Westboro Baptist Church's counsel in the St. David's case. Although

this restraint is more than a collateral consequence flowing from a fine-only conviction, it does not amount to a "severe restraint on individual liberty." See Hensley, 411 U.S. at 351. Petitioner's conviction denies her the right to act as counsel for one case. Regardless of the subjective importance of this case to petitioner, this restraint is not objectively severe enough to allow the court to take jurisdiction under § 2254. Moreover, the court can find no decision by the Supreme Court or this circuit which would allow the court to take habeas corpus jurisdiction under § 2254 when the petitioner is not suffering a present or future custodial sentence. The court concludes petitioner is neither "in custody" nor subject to future custody for the purpose of federal habeas review. The court denies relief under 28 U.S.C. § 2254.

B. Relief Under Sections 1983 and 1988

Petitioner's alternative position is that, if the court finds that it lacks jurisdiction to hear the petition sounding in habeas

corpus, the petition nevertheless alleges a valid claim under sections 1983 and 1988. In her petition, petitioner requests that the court, pursuant to sections 1983 and 1988, "provide such further and additional relief as is appropriate to fully protect her constitutional rights herein enumerated, and award her cost and fees of this action." This request is denied.

Petitioner is, in essence, attempting to use sections 1983 and 1988 to collaterally attack the state court judgment of conviction. The Supreme Court has held that habeas corpus provides the exclusive federal remedy for prisoners attacking the fact or duration of their confinement. Preiser v. Rodriquez, 411 U.S. 475, 477 (1973). "Consequently, it would not permit a section 1983 attack in an action in which habeas would lie." Hanson, 591 F.2d at 409.

> Stripped to the bone, the plaintiff's action under § 1983 is little more than a habeas corpus action without a custody requirement. We do not believe that § 1983 was meant to be a substitute for habeas corpus when there is not custody. Under 28 U.S.C. § 2254, we have authority to

> grant habeas corpus relief to persons in custody pursuant to judgments of state courts. This is the Great Writ, and we endeavor to make it available to those suffering under unconstitutional imprisonment. We have, however, refused to extend habeas corpus relief to those not in custody. Under his theory of § 1983, the appellant would have us sit in perpetual review of all criminal decisions. We will not make the appellant's § 1983 action the greater writ by avoiding the custody requirement of § 2254 indirectly while refusing to extend the custody requirement directly.

Hanson, 591 F.2d at 409; Cavett v. Ellis, 578 F.2d 567, 569 (5th Cir. 1978). Therefore, the court concludes that petitioner has failed to state a cause of action under sections 1983 and 1988.

IT IS, THEREFORE, BY THE COURT ORDERED that petitioner's habeas corpus petition (Doc. 1) is dismissed.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas this 18 day of November 1997.

/s/ G.T. Van Bebber
G.T. VAN BEBBER
United States District Judge

E. Order of the federal district court certifying issues for appeal dated December 23, 1997

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

97 DEC 23 PM 1:57

RALPH L. DELOACH
CLERK

BY:/S/C. BarnihsonDEPUTY
AT KANSAS CITY, KS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARGIE J. PHELPS, Petitioner, vs. HONORABLE MICHAEL BARBARA, CARLA J. STOVALL, and JOHN BORK, Respondents.	)	CIVIL ACTION No. 97-3110-GTV

ORDER

This matter is before the court on petitioner's motion for the issuance of a certificate of appealability (Doc. 27).

Pursuant to 28 U.S.C. § 2253 (c)(2), a certificate of appealability may issue only if the petitioner makes a substantial showing of the denial of a constitutional right. The certificate of appealability shall identify specifically which issues meet this requirement.

Having examined the motion, the court finds the petitioner has made a sufficient showing in support of the following issues to warrant the issuance of a certificate of appealability:

1. Whether respondent Barbara's continued participation in the contempt proceedings against petitioner denied petitioner due process by failing to allow her an opportunity to proceed before an impartial judge?

2. Whether petitioner was denied due process by the respondent's failure to give notice that limitations on her practice of law might result from the contempt

proceedings?

3. Whether this court erred in finding petitioner was not "in custody"?

IT IS, THEREFORE, BY THE COURT ORDERED that petitioner's motion for the issuance of a certificate of appealability (Doc. 27) is granted.

Copies of this order shall be mailed to the parties and to the Clerk of the United States Court of Appeals for the Tenth Circuit.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 23 day of December, 1997.

/s/ G.T. VAN BEBBER
G. T. VAN BEBBER
United States District Judge

F. Order of the Tenth Circuit Court of Appeals affirming dismissal of habeas petition dated October 7, 1998

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OCT 7 1998

PATRICK FISHER
CLERK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARGIE J. PHELPS,

Petitioner-Appellant,

v.

No. 97-3385
(D.C. No. 97-CV-3110)
(D. Kan.)

MICHAEL BARBARA, in his official capacity as Judge of the Third Judicial District, Retired, Assigned; CARLA J. STOVALL, in her official capacity as Attorney General; JOHN BORK, in his official capacity as Assistant Attorney General and Assigned Special Prosecutor,

Respondents-Appellees.

ORDER AND JUDGMENT*

Before **ANDERSON, BARRETT,** and **EBEL,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Margie J. Phelps appeals from the district

court's order dismissing her petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In her petition, Ms. Phelps sought dismissal or reversal of a state court finding of criminal contempt. In the alternative, she sought the same relief under 42 U.S.C. §§ 1983 and 1988. The district court dismissed her claim for habeas relief on the basis that she had failed to satisfy the "in custody" requirement of § 2254. It further dismissed her §§ 1983 and 1988 claims finding that they constituted an impermissible collateral attack on her state court conviction.

The contempt finding against Ms. Phelps arose out of her conduct in St. David's Episcopal Church v. Westboro Baptist Church, No. 94-CV-967, a civil action filed on June 13, 1994 in the Third Judicial District Court, Shawnee County, Kansas. St. David's Episcopal Church (St. David's) filed the action seeking to prevent members of Westboro Baptist Church (Westboro) from harassing or assaulting members of St.

David's as they entered the church. Ms. Phelps served as attorney for Westboro. Judge Michael Barbara, a retired district court judge and a law professor, was assigned to hear the case.

On July 21, 1994, Judge Barbara entered a temporary restraining order imposing limitations on picketing by Westboro members at St. David's. On August 14, 1994, Fred W. Phelps, Sr., Ms. Phelps' father, stated on a Topeka radio program known as the "Old School Baptist Hour" that Judge Barbara had acted immorally and unlawfully in his private life and in a manner which reflected on his fitness to be a law professor.

On September 14, 1994, Ms. Phelps filed a motion for change of judge in the St. David's case. During a hearing on this motion on September 20, 1994, Ms. Phelps presented Judge Barbara with a transcript of Mr. Phelps' statement and had it marked as an exhibit for identification purposes. Judge

Barbara reviewed the exhibit, stated that it contained contemptuous language, and told Ms. Phelps that if she persisted in offering it, she might face contempt proceedings. She withdrew the exhibit.

Judge Barbara thereafter issued an order directing Ms. Phelps to show cause why she should not be held in contempt. Following a hearing in the contempt proceedings, Judge Barbara found her in direct criminal contempt. He ordered her to be removed as counsel in the St. David's case, fined her $500 plus one-half of the cost of proceedings, and prohibited her from practicing law in the Third Judicial District until the fine was paid. The Kansas Court of Appeals upheld the contempt conviction. The Kansas Supreme Court denied Ms. Phelps' motion for review.

Federal courts are empowered to grant habeas corpus relief to persons "in custody pursuant to the judgment of a State court," where that custody violates the Constitution or

laws or treaties of the United States. 28 U.S.C. § 2254. Although the statute refers to persons "in custody," a petitioner need not show that she is in actual, physical custody to obtain relief. See Maleng v. Cook, 490 U.S. 488, 491 (1989). It is sufficient to show that her conviction has made her subject to "severe restraints on [her] individual liberty." Hensley v. Municipal Court, 411 U.S. 345-351 (1973). Restraints are severe when they exceed those which the state imposes upon the public generally, see Jones v. Cunningham, 371 U.S. 236, 242-43 (1963), and when they "significantly restrain [the] petitioner's liberty to do those things which in this country free men are entitled to do," id. at 243.

Courts have generally held that a person sentenced only to a fine or restitution is not "in custody" within the meaning of the habeas statute. See Barry v. Bergen County Probation Dep't, 128 F.3d 152, 160 (3d Cir. 1997), cert. denied, 118 S.Ct. 1097 (1998); Edmunds v. Won Bae Chang, 509 F.2d 39,

41-42 (9th Cir. 1975). Ms. Phelps acknowledges these precedents, but argues that she faces consequences which exceed those present in the typical "fine only" case. She notes that as a result of her contempt conviction she faces the necessity of paying court costs, that she has been "disbarred" from the Third Judicial District of Kansas until the fine has been paid, that she has been "disbarred" from serving as attorney for Westboro in the St. David's case, that she has been required to post a bond, that she has had professional disciplinary proceedings instituted against her, and that she faces disciplinary action against her by her employer, the Kansas Department of Corrections Human Resources Division.

We agree with the district court that even in view of these additional consequences, Ms. Phelps is not "in custody" within the meaning of the habeas statute. First, she fails to show that court costs should be treated any differently than a fine. See Sandoval v. Municipal Court, No. 97-2098, 1998

WL 30240, at **1 (10th Cir. Jan. 9, 1998)(holding combination of fine and court costs did not constitute custody); Wright v. Bailey, 381 F. Supp. 924, 925 (W.D. Va. 1974), aff'd, 544 F.2d 737 (4th Cir. 1976). The restrictions on her ability to practice law and the risk of disciplinary action against her as an attorney do not constitute custody. See Ginsberg v. Abrams, 702 F.2d 48, 49 (2d Cir. 1983)(holding that petitioner's removal from the bench, loss of license to practice law, and disqualification from being licensed as a real estate broker or insurance agent was not custody).[1] Potential

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[1] Ms. Phelps cites a number of cases in which courts have held that a habeas petition was not moot because the petitioner remained subject to professional discipline. See, e.g., Watson v. Block, 102 F.3d 433, 437 n.3 (9th Cir. 1996), rev'd on other grounds, Pounders v. Watson, 117 S. Ct. 2359 (1997); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir. 1992). We do not find these cases persuasive here. They concern the question of whether sufficient collateral consequences remained to present a live controversy after a sentence of incarceration had been served. Custody and collateral consequences are two separate issues. See Maleng, 490 U.S. at 491-92; see also United States v. Keane, 852 F.2d 199, 202 (7th Cir. 1988)("Civil disabilities (collateral consequences) may prevent

disciplinary action by her employer, similarly, does not constitute custody, even though it may "greatly [limit her] economic mobility." Id. Finally, Ms. Phelps does not contest the appellees' contention that the bond which she posted was a supersedeas bond for purposes of taking appeal, rather than a bond to secure her release from incarceration. The cases she cites in which prisoners released on bond have been considered "in custody" for habeas purposes are therefore inapplicable. Considering all of the alleged restrictions in combination, we conclude that the restraint on Ms. Phelps' liberty is insufficient to constitute custody for purposes of the habeas statute. The district court acted properly in dismissing her habeas claims.

We turn, therefore, to her alternative argument, that she is entitled to relief on her civil rights claims pursuant to 42 U.S.C. §§ 1983 and 1988. The district court also acted

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a challenge begun during imprisonment from becoming moot on release, but civil disabilities alone are not 'custody' authorizing collateral litigation." (citation omitted)).

properly in dismissing these claims.

> A federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may be had only in the United States Supreme Court. Federal district courts do not have jurisdiction over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986)(citations and quotations omitted).

Ms. Phelps' constitutional challenge is "inextricably intertwined" with the state court decision. See id. She acknowledges the force of this rule, but argues that her circumstances place her within one or more purported exceptions to it. We have reviewed her arguments concerning the alleged exceptions, and do not find them persuasive.

The judgement of the United States District Court for the District of Kansas is therefore AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

G. Order of the Tenth Circuit Court of Appeals denying petition for rehearing with suggestions for rehearing en banc dated November 6, 1998

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARGIE J. PHELPS,

Petitioner-Appellant,

v. No. 97-3385

MICHAEL BARBARA, in his official capacity as Judge of the Third Judicial District, Retired, Assigned; CARLA J. STOVALL, in her official capacity as Attorney General; JOHN BORK, in his official capacity as Assistant Attorney General and Assigned Special Prosecutor,

Respondents-Appellees.

ORDER

Filed November 6, 1998

Before **ANDERSON, BARRETT,** and **TACHA,** Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk